

A **BAYANGAN SEPADU SDN BHD v. JABATAN PENGAIRAN DAN
SALIRAN NEGERI SELANGOR & ORS**

COURT OF APPEAL, PUTRAJAYA
HASNAH MOHAMMED HASHIM JCA
KAMALUDIN MD SAID JCA

B LEE SWEE SENG JCA
[CIVIL APPEAL NO: B-01(NCVC)(W)-328-05-2018]
24 AUGUST 2020

C ***TORT: Trespass – Trespass to land – Land purchased through public auction – Purchaser discovered existence of retention pond and structures on land after purchasing land – Whether existence of retention pond and structures justified – Whether purchaser took necessary steps to inspect land before making purchase – Whether doctrine of caveat emptor applied – Whether there was trespass***

D The present appeal concerned a piece of land purchased by the appellant ('plaintiff') through a public auction. According to the plaintiff, when it conducted a search, there was no indication that there was in existence a retention pond and permanent structures nor that the portion of the land had been surrendered to the respondents ('defendants') by the previous owners. Successful in his bid, the plaintiff purchased the land at RM3.66 million. The plaintiff carried out another land search and the search indicated that the retention pond and permanent structures were never surrendered to the defendants. A survey carried out by a land surveyor engaged by the plaintiff revealed that besides the retention pond and permanent structures, there were also Tenaga Nasional Bhd's substation, staff quarters, huts and storeroom on the land. The plaintiff commenced an action against the defendants, at the High Court, seeking (i) an injunction restraining the defendants from trespassing; (ii) an order that the defendants remove the fence and/or other structures and restore the land to the condition in which it was before such fences and/or structures were erected or constructed; and (iii) an order that the defendants, jointly and/or severally, pay damages for trespass. The defendants, on the other hand, counterclaimed for (i) a declaration that the land belonged to the State of Selangor; (ii) an order that the defendants were entitled to damages and the plaintiff to bear the construction cost of the retention pond; and (iii) exemplary damages. The High Court held that (i) the previous owners had given their consent and permission to surrender part of the land for the purpose of flood; and (ii) there was a valid surrender of the land to build the retention pond and the other structures. Regarding the counterclaim, the High Court awarded damages, interests and costs. Hence, the present appeal.

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Held (dismissing appeal)

Per Hasnah Mohammed Hashim JCA delivering the judgment of the court:

- (1) The legal maxim *caveat emptor* or 'let the buyer beware' must necessarily apply to this case. The plaintiff, as the purchaser, should have inspected the land and make inquiries as to the property which it was proposing to bid. If the plaintiff omitted to ascertain whether the land as such as it had expected to be, the plaintiff could not complain upon discovering the existence of the retention pond and the structures. If the plaintiff had conducted a physical inspection of the land as required in the proclamation of sale, it was highly inconceivable that the plaintiff did not have sight of, not only the retention pond, but the structures built on the land. The searches conducted by the plaintiff at the land office were insufficient to reveal the actual physical landscape of the land; neither would they have revealed any existing structures built on the land. The plaintiff ought to have known, or otherwise deemed to have known, of the infrastructure on the land. Furthermore, the proclamation of sale had stated that the majority part of the land was covered by a lake or retention pond. (para 31)
- (2) The entry upon the land could not be regarded as unjustifiable intrusion as it was with the consent of the previous owners that the land was surrendered to the third defendant. The land was surrendered to the defendants by the previous owners as part of the mitigation for severe flood. It would be ridiculous to acquire the land now after the retention pond had been built and maintained by the State Government for flood mitigation for the benefit of, not just one entity, but for the whole community, in particular the residents of the housing area and its neighbouring housing area. The plaintiff's claim against the defendants for trespass and damages was without basis and could not be sustained. (paras 34 & 36)
- (3) The counterclaim had not been proved sufficiently by the defendants. Since the land had been surrendered to the third defendant and was placed under its supervision and maintenance, the cost of construction and maintenance of the retention pond and the structures must necessarily be borne by the third defendant. The High Court's decision with regard to the counterclaim, which was the award of damages, interests and costs, were set aside. (paras 39 & 40)

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- A Case(s) referred to:**
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC (*refd*)
Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA (*refd*)
One Visa Sdn Bhd v. Telekom Malaysia Bhd [2015] 10 CLJ 569 HC (*refd*)
Segar Restu (M) Sdn Bhd v. Wong Kai Chuan & Anor [1994] 4 CLJ 757 HC (*refd*)
Tenaga Nasional Bhd v. Bukit Lenang Development Sdn Bhd [2019] 1 CLJ 42 FC (*refd*)
- B Legislation referred to:**
Government Proceedings Act 1956, ss. 5, 6, 7
Limitation Act 1953, ss. 6, 9
National Land Code, s. 204
Public Authorities Protection Act 1948, s. 2(a)
- C Rules of Court 2012, O. 18 r. 19**
- Other source(s) referred to:**
Clerk & Lindsell on Tort, 20th edn, paras 19 to 29, pp 1223 to 1238
Halsbury's Laws of England, 3rd edn, vol 34, p 212
Halsbury's Laws of England, 4th edn, vol 45, para 1384, p 631
- D For the appellant - Leong Wai Hong, Richard Kok Chi Wei & Tan Ko Xin; M/s Rhiza & Richard**
For the respondents - Siti Fatimah Talib; SLA & ETTY Eliany Tesno; SFC
[Editor's note: For the High Court judgment, please see Bayangan Sepadu Sdn Bhd v. Jabatan Pengairan Dan Saliran Negeri Selangor & Anor [2018] 1 LNS 1440 (affirmed).]
- E Reported by Najib Tamby**

JUDGMENT

- F Hasnah Mohammed Hashim JCA:**
- [1]** This appeal arose from the decision dated 27 April 2018 in respect of a piece of land described as HS(M) 20109, Lot PT 18903, Mukim Klang, Tempat Bukit Kemuning, Daerah Klang (“the land”). We heard the oral submissions of the respective counsel for the parties and upon evaluating
- G** both the oral and written submissions as well as considering the learned Judicial Commissioner’s (“JC”) grounds of judgment (“GOJ”), by majority, we found no merits in the appeal to warrant our intervention and dismissed the appeal with costs. We now give our full reasons for deciding so.
- H [2]** For the purpose of this judgment, the parties will be referred to as they were in the High Court.
- Material Facts**
- [3]** We summarised the material facts as follows. In the High Court the plaintiff had sought the following reliefs:
- I** (i) an injunction restraining the defendants from trespassing;

- (ii) an order that the defendants remove the fence and/or other structures and restore the land to the condition in which it was before such fences and/or structures were erected or constructed; A
- (iii) an order that the defendants, jointly and/or severally, pay damages for trespass on the land from 25 March 2011 or a date the court deems fit to the date the defendants cease trespass; and B
- (iv) interest and costs.

[4] The defendants, on the other hand, had filed a counterclaim against the plaintiff and had sought the following reliefs:

- (i) a declaration that the land belongs to the State of Selangor; C
- (ii) an order that the defendants are entitled for damages and the plaintiff to bear the construction cost of the retention pond;
- (iii) exemplary damages; and D
- (iv) interest and costs.

[5] The land which is in dispute was previously jointly owned by Newacres Sdn Bhd and Bumi-Murni Sdn Bhd (“the previous owners”). The plaintiff had on 25 March 2011 purchased the land by a public auction conducted by the Klang Land Office. The judicial sale was on the application of the chargee bank, CIMB Bank Berhad (“CIMB”). The proclamation of sale dated 25 March 2011 described the land and provided salient particulars of the land. The plaintiff conducted a search, however, it is contended by the plaintiff that the search did not show the existence of the retention pond and the structures built on the land neither did it indicated that the portion of the land had been surrendered to the defendants by the previous owners. The plaintiff successfully bid for the land in the public auction and purchased the land for RM3.66 million. After the auction, the plaintiff carried out another land search on 4 May 2011 which, according to the plaintiff, indicated that the portion of the land where the retention pond and the structures were built was never surrendered to the defendants. E F G

[6] Sometime in July 2011, the plaintiff engaged a licensed land surveyor to conduct a survey of the land. The survey revealed that the retention pond was on the land and that there were also other permanent structures on the land; a Tenaga Nasional Bhd (TNB) substation, staff quarters, huts and storeroom (“the structures”) surrounding the retention pond which form part of the land, about 9.554 acres out of 17.49 acres. The plaintiff confirmed that the certified plan of the land with the Department of Survey and Mapping Malaysia shows that the retention pond is part of the land and that the defendants had fenced up and erected the structures next to the retention H I

A pond. The plaintiff had written a letter dated 27 September 2013 to the first and second defendants requesting for information and documents to justify the defendants' occupation of the land.

[7] In response, by a letter dated 25 October 2013, the first defendant explained that they were in the process of collecting the relevant documents as well as information with regards to the project and the retention pond on the land. The plaintiff was informed that a meeting would be called to discuss the matter once the relevant documents/information were obtained. Subsequently, by a letter dated 11 September 2014, the first defendant wrote to Klang Land Administrator to apply to enter a registrar's caveat on the land and the caveat was subsequently entered on 19 September 2014.

[8] On 10 December 2014, the plaintiff filed an application in the Shah Alam High Court *via* Originating Summons No. 24-1381-12-2014 ("OS") against the first and second defendants for discovery to provide necessary documents to justify the defendants' occupation on the land. The High Court allowed the OS on 23 July 2015.

[9] The defendants then lodged a police report (No. SEK9/002493/15) on 11 March 2015, stating that they were unable to locate the project file namely "Projek Rancangan Tebatan Banjir Taman Sri Muda Seksyen 25 Shah Alam" and intended to gather documents and plans from Majlis Bandaraya Shah Alam ("MBSA").

[10] To support its claim that the portion of the land was surrendered to the third defendant, the following documents were produced:

- (i) a copy of official search and Form 11B for the land (pp. 63 to 66, bundle B);
- (ii) letter dated 16 September 1996 by Newacres Sdn Bhd to MBSA (p. 70, bundle B);
- (iii) site plan, location plan and source plan (p. 71, bundle B); and
- (iv) layout plan dated 8 June 2006 (p. 74, bundle B).

[11] Despite the documents as stated above, the plaintiff's solicitors wrote to the first defendant on 16 March 2017 and demanded an irrevocable and unconditional undertaking among others, the delivery of vacant possession of the land and removal of the fence and structures within three days. The plaintiff then proceeded to file the suit on 20 March 2017. The defendants then filed an application for striking out under O. 18 r. 19 of the Rules of Court 2012 (ROC) on 26 October 2017 but the application was withdrawn and the matter proceeded for trial.

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[12] The defendants justified the occupation of the land based on the following documents: A

- (i) A letter dated 21 August 1996 from YY Woo Akitek (“YYW”) to MBSA where the previous owners, had appealed against a reduction in “density” by stating that 41% of the project, ie, a portion of a land measuring 14 acres had been “surrendered” to build a retention pond. B
- (ii) A letter dated 16 September 1996 to MBSA from the previous owner had agreed to build and surrender the retention pond to MBSA for maintenance thereafter, as a condition to receive planning permission.
- (iii) A letter dated 24 July 1997 from one Ahmad Zamri bin Kamaruddin, Ketua Jabatan Perancang Bandar of MBSA to YYW informing that MBSA has imposed a condition for the construction of a retention pond for development on Lot 18908. C
- (iv) The layout plan of “Cadangan Pembinaan Kediaman, Asrama, Kompleks Sukan dan Kolam Tadahan Air di atas Lot 38618” was approved on 26 September 1996 and registered on 18 July 1997. D
- (v) A letter by MBSA dated 20 April 2006, in respect of planning permission on Lot 38618.

[13] The agreed issues before the JC in the High Court are as follows: E

- (i) Whether there was a valid surrender of a part of the land which according to the defendants measures approximately 14 acres by the previous owners of the land to the State Authority of Selangor to build a retention pond and its structures. F
- (ii) Whether the retention pond and the structures that were built on the land which according to the defendants measuring approximately 14 acres belonged to the State Authority of Selangor.
- (iii) Whether the plaintiff when he bought the land is subject to the terms and conditions of the auction sale, in particular cl. 18 of the proclamation of sale. G
- (iv) Whether the defendants are trespassing on the land by occupying and/or continue to occupy the retention pond and the structures.
- (v) Whether the plaintiff's action is amounting to laches and/or barred by s. 2(a) of the Public Authorities Protection Act 1948 and/or ss. 6 and/or 9 of the Limitation Act 1953, and/or against ss. 5, 6 and/or 7 of the Government Proceedings Act 1956. H

[14] The learned JC decided to address both the issues in paras. (i) and (ii) in the main claim together as the issues are intricately interlinked, that is, the validity of the surrender of the land by the previous owners to the State I

- A Authority of Selangor and, the ownership of the retention pond together with the structures built on the land measuring approximately 14 acres, that is whether they belong to the third defendant.

- [15] The learned JC was satisfied that there was sufficient evidence to support that the previous owners had given their consent and permission to
B surrender part of the land for the purpose of constructing the retention pond to prevent the recurrence of flood in Taman Sri Muda area. By the letter dated 16 September 1996, the previous owners had undertaken to build the retention pond at their costs and upon completion, hand over the retention pond to the local authority. The letter dated 16 September 1996 was not
C disputed by the plaintiff. Learned JC gave her reasons in her GOJ as follows:

- [22] I am satisfied that there are sufficient evidences (*sic*) to support that the previous owners had consented and given their permission to surrender part of their land for the purpose of constructing the retention pond. By the letter dated 16 September 1996, the previous owners
D undertake to build the retention pond at their own costs and upon completion will hand over to MBSA for the maintenance process. The letter dated 16 September 1996 (B3 pp. 7 & 8) was not disputed on their existence and the plaintiff agreed that the document to be put in Part B ...

- [23] I also took cognisance (*sic*) of the layout plan at p. 74 of bundle B which support the facts that:

- (a) the letter dated 16.9.1996 was taken into consideration for the purpose of amendment to building plan/planning permission as per the title of that letter of that letter at p. 7 of bundle B3, signed by the director of previous owners.
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(b) the council meeting of MBSA had approved the project with the layout plan on 26.9.1996 as per the endorsement therein. The layout plan was registered on 18.7.1997 as PELAN NO: MPSA/PRG/PT 25C-3-97 FAIL NO: MPSA/PRG/2016-96 (25C) TARIKH 18.7.1997.
G
(c) the layout plan was based on the letter by MPSA dated 24 July 1997, referring to the endorsement on the plan which stated that "Pelan ini adalah berdasarkan surat (30) MPSA/PRG/2016-96 (25C) bertarkh (*sic*) 24.7.1997".
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(d) the land involved in this case is PT 18903 which at that time presumably formed part of "Lot PT 18909 and Lot 82" which originally Lot 38618, referring to the title namely "Pindaan Pelan Tatatur Kepada Pelan Kelulusan No. JPBK B4/18/87/PD Bertarikh 25hb Mac 1987" and project title "Cadangan Pembangunan Kediaman Asrama Komplek Sukan Dan Kolam Tadahan Air Diatas Lot 38618 (34 Ekar) Disebahagian Seksyen 25, Shah Alam, Selangor
I Darul Ehsan Untuk Tetuan Bumi Murni Sdn. Bhd.", and

- (e) Subsequently, after meeting on 24 October 1997, previous owners had no objection on the placement of the retention pond and the construction of the retention pond had been completed in 1998, (refer to minutes of meeting at pp. 88-89).

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[16] The previous owners had surrendered the land to MBSA for the retention pond to be constructed to prevent the recurrence of flood. The previous owners in its letter had stated Lot 18909 instead of Lot 18903. However, the previous owners had never objected to the construction of the retention pond on Lot 18903. From 1997 until the date of auction on 25 March 2011, there was no evidence, oral or documentary of any objection of the construction of the retention pond on Lot 18903. Based on the oral and documentary evidence before her the learned JC found that that there was valid surrender of the land (approximately 14 acres) to build the retention pond as well as the other structures.

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[17] The plaintiff through the evidence of Lee Hoy Voon, the plaintiff's director (PW1) admitted that the plaintiff knew of the existence of the retention pond before the auction. Based on both documentary and oral evidence before her, the learned JC concluded that the plaintiff had "... full knowledge and even accepted the location and description of the land including the retention pond which covered the major part of the land has been surrendered to the State of Selangor." (see para. 33, GOJ). Therefore, the defendants did not commit an act of trespass as alleged by the plaintiff.

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[18] Before us, the plaintiff's complaints, *inter alia*, were as follows:

- (i) the register document of title for Lot 18903 shows that the plaintiff is the owner and does not show that the defendant has any registered interest. Therefore, the register document of title is conclusive of ownership;
- (ii) the retention pond and the structures built on Lot 18903 was wrongly built on Lot 18903. The defendant had entered and build on the wrong lot;
- (iii) CIMB as the chargee never consented to the transfer;
- (iv) the previous owners had never validly transfer the Lot 18903;
- (v) this is a case of continuing trespass by the defendants;
- (vi) the terms and conditions of the auction cannot be relied on by the defendants;
- (vii) the previous owners failed to construct the retention pond and the structures as proposed when the planning permission was obtained. The defendants had proceeded to wrongly entered and built the retention pond on the wrong lot of the plaintiff's land; and

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- A (viii) Lot 18903 has not been validly transferred to the defendants to construct the retention pond and the structures as CIMB's consent as the chargee was never obtained as required under s. 204 of the National Land Code ("NLC").

Our Decision

- B [19] Before dealing with the issues raised, it is necessary to set out and to summarise the essential legal principles.

- C [20] We are mindful of the limited role of the appellate court in relation to findings of facts made by the court of first instance. The general principle is that the conclusion of a trial judge is a finding of fact on the oral evidence based on the demeanour and credibility of the witnesses before him or her. Generally, such finding ought not to be disturbed unless the appellate court is convinced that it is plainly wrong. It would not be sufficient to warrant any interference merely because the appellate court entertains doubt whether such finding is right (see *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; and *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309). Having set out the legal principles underlying appellate intervention, we now turn to the facts of the present case.

- E [21] The appeal before us was basically against the above finding of the learned JC. As alluded to earlier, the issue before this court is whether the defendants had committed trespass by wrongly entering and proceeding to construct the retention pond on the wrong lot. It is the plaintiff's case that Lot 18903 has never been validly transferred or surrendered to the defendants to construct the retention pond and the structures as CIMB's consent as the chargee was never obtained as required under s. 204 of the NLC.

- F [22] Trespass according to the author of *Halsbury's Laws of England*, 4th edn, vol. 45, para. 1384, p. 631 is unlawful entry on a property which is in possession of another:

- G Every unlawful entry by one person on land in the possession of another is a trespass for which an action lies, even though no actual damage is done. A person trespasses upon land if he wrongfully sets foot on it, rides or drives over it or takes possession of it, or expels the person in possession, or pulls down or destroys anything permanently fixed to it, or wrongfully takes minerals from it, or places or fixes anything on it or in it, or if he erects or suffers to continue on his own land anything which invades the airspace of another, or if he discharges water upon another's land, or sends filth or any injurious substance which has been collected by him on his own land on to another's land.

- H [23] The passage found in at p. 1223 of the text of *Clerk & Lindsell on Tort* (20th edn), describes trespass as:

I ... any unjustifiable intrusion by one person upon land in the possession of another.

[24] In *Segar Restu (M) Sdn Bhd v. Wong Kai Chuan & Anor* [1994] 4 CLJ 757; [1994] 3 MLJ 530 Abdul Malik Ishak J (as he then was) explained who is a trespasser:

In law, a trespasser is one who wrongfully enters on land in the possession of another, and has neither right nor permission to be on the land. Lord Dunedin in *Robert Addie & Sons (Collieries) Ltd v. Dumbreck* [1929] AC 358 at p 371 aptly described a trespasser as one “who goes on the land without invitation of any sort and whose presence is either unknown to the proprietor or if known, is practically objected to”.

[25] The Federal Court in through the judgment of Mohd Zawawi Salleh FCJ in *Tenaga Nasional Bhd v. Bukit Lenang Development Sdn Bhd* [2019] 1 CLJ 42 said:

Put simply, trespass onto land is the unlawful direct and immediate interference with the possession of land which is in the possession of another person, or which another person is entitled to possession of. A Latin maxim is frequently employed to define the extent of land: “*cui us est solum, eius est usque ad coelum et ad inferos*” – he who owns the land, owns it all the way to the heavens and to hell. This principle is often referred to in its abbreviated form as *ad coelum* principle. In modern law, this principle is still accepted in limited form, and rights are divided into space rights and subsurface rights below.

[26] As confirmed by the authoritative text of *Clerk & Lindsell on Tort (supra)* pp. 1236 to 1238, paras. 19 to 29, entry upon a land is not trespass if it is justifiable:

An entry upon the claimant’s land is not a trespass if it is justifiable.

Justification of the entry may be afforded either by operation of law, or by the act of the claimant **or of his predecessors in title**, where the entry is made under a right of easement or of *profit a prendre*, or under a licence, and a like rule applies where persons deviate on to private land because the owner of such land has obstructed a right of way adjacent thereto ...

(emphasis added)

[27] The learned Senior Federal Counsel submitted that the said land was surrendered to the defendants by the previous owners. In support of this argument, the defendants relied on the letter dated 16 September 1996. For ease of reference we reproduced the letter dated 16 September 1996 written by the previous owners to the defendants declaring unequivocally and unconditionally that they were prepared to build the retention pond on the said land in order to overcome the flood issues in Taman Muda Shah Alam; and that upon completion the said land will be surrendered to the defendants:

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NEWACRES SDN BHD (COMPANY NO. 36121-V)
1st Floor Wisma Equity 150 Jalan Ampang 50450 Kuala Lumpur Tel: 2626888 / 2625133 / 2618911 Fax: 2614195

Rujukan Tuan : MPSA/PRG/2016-96(25C)
Rujukan Kami : NEM/312/ASL (c)

16hb September 1996

Majlis Perbandaran Shah Alam
Jabatan Perancang Bandar
Tingkat 2, Wisma MPSA
Persiaran Perbandaran
40675 Shah Alam
Selangor Darul Ehsan

(U/P : En. Ahmad Zamri B. Kamaruddin)

Tuan,

PERMOHONAN MENDAPATKAN KELULUSAN PERANCANGAN BAGI CADANGAN
PINDAAN PELAN TATATUR DI ATAS LOT PT 18909 DAN SEBAHAGIAN
LOT 82, SEKSYEN 25, SHAH ALAM UNTUK TETUAN NEWACRES SDN BHD
DAN BUMI MURNI SDN BHD

Dengan hormatnya saya diarah merujuk kepada perkara di atas.

Untuk makluman tuan, pihak kami telah memperuntukkan tanah seluas
14.0 ekar (sila rujuk pelan disertakan) kepada majlis untuk
cadangan pembinaan Kolam Tahanan sebagai sumbangan kami bagi
mengatasi banjir di Taman Sri Muda.

Seterusnya pihak kami, juga dengan pembiayaan sendiri menanggung
kos perbelanjaan pembinaan Kolam Tahanan tersebut. Pembinaan
tersebut akan dimulakan sebagai Fasa I selaras dengan pembinaan
Fasa ke II rancangan mengatasi banjir oleh pihak majlis.
Pembangunan kediaman di sekitar kawasan Tahanan akan dibangunkan
sebagai Fasa II setelah siap pembinaan kolam tersebut.

Setelah siapnya cadangan pembinaan Kolam Tahanan tersebut, pihak
kami akan menyerahkan tapak berkenaan kepada pihak majlis untuk
proses penyelenggaraan.

...2/-

PPB1,
17/9/96

28/9

23.9.96

[28] The land described as PT 18903 in the proclamation of sale formed part of Lot PT 18909 and Lot 82, originally Lot 38618. The proclamation of sale in relation to the auction of the land had warned explicitly to all members of the public who had intended to bid at the public auction of the said land to amongst others, conduct an official title search at the relevant land office. The warning was bold and underlined:

NOTE: All intending bidders are advised to conduct an official title search at the relevant land office and to inspect the subject property before the commencement of the auction sale.

PROCLAMATION OF SALE		135
ORDER FOR SALE AT THE REQUEST OF CHARGE		437
PTK.15A/239/2003		
In the matter of section 263 and section 265(5) of the National Land Code 1965		
CIMB BANK BERHAD	BETWEEN	CHARGE
NEWACRES SDN BHD DAN BUMI MURNI SDN BHD	AND	CHARGORS
In the matter of an Order of Pentadbir Tanah Daerah Klang, Selangor Darul Ehsan made herein on the 19.7.2005, 8.10.2009, 12.5.2010, 3.8.2010 and 7.2.2011 it is hereby proclaimed that the Pentadbir Tanah Daerah Klang with the assistance of the undermentioned Auctioneer will sell by		
PUBLIC AUCTION		
ON FRIDAY THE 25 TH DAY OF MARCH 2011 AT 10.00 A.M IN THE AUDITORIUM 2 ND FLOOR, PEJABAT DAERAH/TANAH KLANG JALAN KOTA, 41902 KLANG, SELANGOR DARUL EHSAN		
<u>NOTE: All intending bidders are advised to conduct an official land search at the relevant Land Office and to inspect the subject property before the commencement of Auction sale.</u>		
PARTICULAR OF PROPERTY ACCORDING TO VALUATION REPORT:		
TITLE NO	:	HSM 20109
LOT NO	:	PT 18903
MUKIM/DISTRICT/STATE	:	Klang/Klang/Selangor Darul Ehsan
LOCALITY	:	Bukit Kemuning
TENURE	:	Leasehold 99 years (Expiring date : 1 TH October 2089)
PROVISIONAL LAND AREA	:	70,816,0907 square metres (762,283 square feet)
ANUAL RENT	:	RM10,214.00
CATEGORY OF LAND USED	:	Bangunan /Building
EXPRESS CONDITION	:	Bangunan Kediaman /Residential Building
RESTRICTION IN INTEREST	:	Tanah yang diberi milik ini tidak boleh dipindah milik, digandai atau dipajak melainkan dengan kebenaran Pihak Berkuasa Negeri.
REGISTERED OWNERS	:	NEWACRES SDN BHD AND BUMI MURNI SDN BHD - 1/1 share
ENCUMBRANCES	:	Charged to CIMB BANK BERHAD via presentation No. 4182/1999 Vol. 498. Fol. 28 dated 4 th August 1999. Private Caveat lodged by Sun Rock Development Sdn Bhd via Presentation No: 4299/2010 dated 28 th September 2010
LOCATION AND DESCRIPTION OF PROPERTY		
The subject property comprises a parcel of development land held under title no. HSM 20109, PT 18903, Mukim of Klang, District of Klang, State of Selangor Darul Ehsan. The land is located at Jalan Cekal 25/34, Taman Sri Muda, Seksyen 25, 40000 Shah Alam, Selangor Darul Ehsan. It is located approximately 35 kilometres due south-west of Kuala Lumpur city centre and is about 10 kilometres due south of Shah Alam city centre. It is accessible from Shah Alam city centre via Persiaran Tengku Ampuan, Persiaran Perusahaan, Persiaran Budiman, Jalan Gemilang 25/1, Jalan Tokoh 5/28 and finally turning onto Jalan Cekal 25/34 leading to the subject property. That a retention pond/lake which was covered major part of the subject property.		

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RESERVE PRICE

The subject property will be sold subject to a reserve price of RM3,608,550.00 (RINGGIT MALAYSIA: THREE MILLION SIX HUNDRED EIGHT THOUSAND FIVE HUNDRED FIFTY ONLY) and subject to the conditions of sale as mentioned in the proclamation of sale. All intending bidders shall deposit 10% of the reserve price in a form of Bank Draft made in favour of CIMB BANK BERHAD before 10.00 am on the date of auction and the balance of purchase price shall be settled in full within one hundred and twenty (120) days from the date of sale to the solicitors MESSRS AZIM, TUNKU FARIK & WONG in favour of CIMB BANK BERHAD.

B

For further particulars please apply to the PENTADBIR TANAH DAERAH KLANG or to the solicitors MESSRS AZIM, TUNKU FARIK & WONG, whose address is at Unit 5-03, 5th Floor, Straits Trading Building, 2 Lebuhr Pasar Besar, 50050 Kuala Lumpur. Tel: 03-2697355 (Ref 5.74.4658) or the undermentioned Auctioneer.

C

SYED AUCTIONEER
No. 44, Jalan Tun Teja 3,
Taman Tun Teja,
8000 Rawang,
Selangor Darul Ehsan,
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(emphasis added)

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[29] In addition to conducting a title search, interested bidders were also advised to inspect the subject property. It is also stipulated that there is a retention pond covering a major portion of the land. Condition 18 of the proclamation of sale stipulated as follows:

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Hartanah ini adalah dipercayai dan hendaklah dianggap sebagai diperihalkan dengan betul dan dijual tertakluk kepada semua ismen, caveat, tenansi, tanggungan dan hak (jika ada) yang wujud di atas atau terhadapnya tanpa apa-apa tanggungan yang timbul untuk mengtakrifnya dan tiada kesilapan, pernyataan khilaf atau perihal khilaf boleh membatalkan jualan ini dan tiada bayaran gantirugi dibenarkan mengenainya.

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[30] The legal maxim caveat emptor is succinctly stated in *Halsbury's Laws of England*, 3rd edn, vol 34 at p. 212:

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... the rule is; a purchaser should make inspection and inquiry as to that which he is proposing to buy. If he omits to ascertain whether the land is such as he desires to acquire, he cannot complain afterwards on discovering defects of which he would have been aware if he had taken ordinary steps to ascertain its physical condition; and, although as a general rule a vendor must deliver property corresponding to the description contained in the contract, yet an error in the particulars or description of the property in the contract is not a ground of objection if it is readily corrected on inspection.

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[31] The legal maxim caveat emptor or let the buyer beware, must necessarily apply to this case before us. The purchaser, in this case, the plaintiff should have inspected the land and make inquiries as to the property which it was proposing to bid. If the plaintiff omitted to ascertain whether the land is such as it had expected it to be, the plaintiff cannot upon discovering the existence of the retention pond and the structures erected on

the land, complains. If the plaintiff had conducted a physical inspection of the land as required in the proclamation of sale, it is highly inconceivable that the plaintiff did not have sight of not only the retention pond but the structures built on the disputed land in question. It is the proverbial “elephant in the room”; unmistakably difficult not to miss. The searches conducted by the plaintiff at the land office were insufficient to reveal the actual physical landscape of the land neither would they have revealed any existing structures built on the land. The plaintiff ought to have known, or otherwise deemed to have known of the infrastructure existing on the land. The plaintiff must have been aware if the plaintiff had taken reasonable steps to ascertain the physical condition of the land. As a general rule, a vendor must deliver property corresponding to the description contained in the contract, yet an error in the particulars or description of the property in the contract is not a ground of objection if it is readily corrected on inspection. The proclamation of sale had stated that the majority part of the land in questioned is covered by a lake or retention pond.

[32] The evidence gleaned from the records of appeal reveals that there was no evidence of any objection raised by the previous owners as to the construction of the retention pond on Lot 18903 even though the previous owners’ letter dated 16 September 1996 to MBSA had stated a different lot, that is Lot 18909. Aniza binti Osman, Pegawai Perancang Bandar MBSA (DW6) explained the background of the planning permission that was approved and granted by MBSA:

J: Pemilik asal iaitu Tetuan Newacres Sdn Bhd dan Bumi-Murni Sdn Bhd lebih kurang pada tahun 10.04.1996 telah mengemukakan permohonan untuk mendapatkan kelulusan perancangan bagi cadangan pindaan pelan tataatur daripada Majlis Perbandaran Shah Alam (MPSA) ketika itu melalui perunding arkitek iaitu Tetuan Y.Y. Woo Akitek. Oleh yang demikian, kelulusan telah diberikan pada 26.09.1996 dan telah dimaklumkan kepada perunding melalui surat bertarikh 24.07.1997 dengan syarat-syarat tertentu dan salah satu syarat ialah kolam perlu dibina dan diserahkan kepada MPSA.

S: Kemudian apakah tindakan yang diambil oleh Tetuan Newacres Sdn Bhd dan/atau Tetuan Y.Y. Woo Akitek?

J: Tetuan Y.Y. Woo Akitek melalui surat pada 21.08.1996 telah mengemukakan rayuan untuk menaikkan densiti dengan alasan sebahagian daripada Tanah tersebut iaitu seluas 14 ekar telah diserahkan kepada Kerajaan. Selanjutnya Tetuan Newacres Sdn Bhd melalui surat pada 16.09.1996 juga telah mengesahkan penyerahan tanah seluas 14 ekar kepada Kerajaan untuk pembinaan kolam takungan.

[33] *Vide* a letter dated 24 July 1997, Ahmad Zamri bin Kamaruddin, Ketua Jabatan, Perancang Bandar of MBSA informed the previous owners’ architect, YY Woo Akitek, that MBSA had imposed a condition for the construction of a retention pond on Lot 18908. This was followed by a

- A meeting to further discuss the prevention of the recurring floods in Taman Sri Muda area. Cheremi bin Tarman, Pengarah Kejuruteraan MBSA (DW2) testified that a meeting was held on 24 October 1997 to discuss the steps to be taken to solve the recurrence of flood in Taman Sri Muda area as well as the new layout plan for the placement of the retention pond:
- B Saya telah mempengerusikan satu mesyuarat Projek Pencegahan Banjir di Taman Sri Muda Seksyen 25, Shah Alam Selangor Darul Ehsan - Fasa 2 pada 24.10.1997 yang mana dihadiri oleh pihak dan agensi teknikal yang terlibat antaranya JPS, Jurutera Daerah, Jabatan Pengairan dan Saliran Daerah Klang, **wakil-wakil pemilik asal Tetuan Newacres Sdn Bhd** dan Kontraktor JPS bertujuan untuk menyelaraskan Projek Rancangan Tebatan Banjir Fasa 1 dan 2. Dalam mesyuarat tersebut, pemilik asal iaitu Tetuan Newacres Sdn Bhd **tiada halangan untuk pembinaan kolam takungan banjir di tempat yang dicadangkan** oleh JPS dan MBSA dan oleh yang demikian, telah diputuskan kedudukan kolam takungan banjir di tempat tersebut. (emphasis added)
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- D [34] By a letter dated 5 July 2016 issued to the plaintiff, confirmed that the planning permission on the land was still enforceable as the retention pond has been built as per the conditions of the planning permission. It would have been an ideal option then if the land owned by the previous owners was acquired by the defendants for the purposes of building the retention pond.
- E However, instead due to the severity of the flood issues the land was surrendered to the defendants by the previous owners as part of the action for flood mitigation. It would be quite ridiculous to acquire the land now after the retention pond has been built and maintained by the State Government for flood mitigation for the benefit of not just one entity but for
- F the whole community, in particular the residents of the Taman Sri Muda Shah Alam housing area, including the residents of the housing area nearby.
- [35] In the case of *One Visa Sdn Bhd v. Telekom Malaysia Bhd* [2015] 10 CLJ 569 the court held that:
- G The plaintiff purchased the lands on the basis of “as is where is” as evidenced by the proclamation of sale for the public auction. The application of “as is where is” was in relation to the plaintiff’s purchase of the lands according to its existing condition. The plaintiff ought to have known or was otherwise deemed to have known about the exercise of the defendant’s infrastructure and of any squatters prior to the purchase of the lands ... As such, the plaintiff’s claim against the defendant for trespass and damages pursuant to it with regards to the presence of the squatters on the lands was without basis and could not be sustained.
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- I [36] We agreed with the learned JC that the entry upon the land cannot be regarded an unjustifiable intrusion as contended by the plaintiff as it was with the consent of the previous owners that the land was surrendered to the third defendant. Thus, we are of the considered view that the plaintiff’s claim against the defendants for trespass and for damages is without basis and cannot be sustained.

[37] After having heard the parties at length and upon careful perusal of the records of appeal, we find no appealable error to warrant our intervention. In the circumstances, and for the reasons we have given, we are of the considered opinion that there was a valid surrender of the land, approximately 14 acres by the previous owners to the defendants to build the retention pond and the structures.

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The Counterclaim

[38] Turning now to the counterclaim, we feel it necessary if we reproduce the counterclaim filed by the defendants:

- (i) a declaration that the land belongs to the State of Selangor;
- (ii) an order that the defendants are entitled for damages and the plaintiff to bear the construction cost of the retention pond;
- (iii) exemplary damages; and
- (iv) interest and costs.

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[39] Since the land has been surrendered to the third defendant and under its supervision and maintenance, the cost of construction as well as the maintenance of the retention pond and the structures erected thereon must necessarily be borne by the third defendant.

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Conclusion

[40] In the light of the above settled principles and after having heard the parties at length and upon careful perusal of the records of appeal, in the circumstances, and for the reasons stated, we are of the unanimous view that the appeal must be allowed in part. We find no merit to intervene in the learned JC's decision on the validity of the surrender of the land to the third defendant. That decision is affirmed. However, in respect of the counterclaim, we are satisfied that the claims have not been proved sufficiently by the defendants. We, therefore, do not award any damages. The learned JC's decision with regards to counterclaim, that is, the award of damages, interests and costs are set aside. The other orders of the High Court dated 27 April 2018 are affirmed. Costs of RM20,000 to be paid to the defendants. Deposit to be refunded.

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